Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

No. 75-145

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE NORTHERN CHEYENNE TRIBE, PETITIONER

v.

WILLIAM HOLLOWBREAST, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The Act of June 3, 1926, 44 Stat. 690, provided for the allotment of land on the Northern Cheyenne Indian Reservation in Montana to individual Indians. It reserved mineral rights for the Tribe, with the following proviso (44 Stat. 691, Section 3):

> That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs * * *.

In 1968, however, Congress amended the 1926 Act by deleting the above proviso and adding language reserving the mineral rights for the benefit of the Tribe "in perpetuity." Act of July 24, 1968, 82 Stat. 424. The 1968 Act also provided, however, that this provision would be ineffective unless the Tribe secured a judicial decision that the mineral rights were not vested in the allottees by the 1926 Act (82 Stat. 425, Section 2). The question presented in this case, filed by the Tribe pursuant to the latter provision, is whether the 1926 Act created a vested property right in the allottees. If so, the 1968 statute would by its terms be null and void and the mineral interests would pass in 1976 to the allottees and their successors in interest.[1]

[1] The Act of July 24, 1968, 82 Stat. 424, states:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586), is hereby amended to read as follows:

"'SEC. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

"'(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.'

"SEC. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21, 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act."

For the reasons set out below, the United States takes no position in this case and does not intend to file further papers herein. At the request of the Department of the Interior, however, we are including in this memorandum a statement of the views of that Department.

In the District Court and before the Court of Appeals the Department of Justice represented Myron L. Littlebird, an Indian with an inherited interest in an allotment on the Northern Cheyenne Reservation. This representation was undertaken at Mr. Littlebird's request pursuant to 25 U.S.C. 175, which authorizes such representation.[2] In the lower courts, the Department of Justice argued on Mr. Littlebird's behalf that the 1926 Act created a vested property right in the allottees, principally on the basis of a comparison of the 1926 Act with similar Acts dealing with other res-

[2] 25 U.S.C. 175 provides as follows: "In all States and Territories where there are reservations or allotted Indians the United States Attorney shall represent them in all suits at law and in equity." This provision has been held to establish a discretionary authority to provide representation rather than a mandatory duty. See *Siniscal* v. *United States*, 208 F.2d 406 (C.A. 9), certiorari denied, 348 U.S. 818.

ervations, which specifically gave Congress the power to alter a scheduled passing of mineral rights to allottees.[3] Accordingly, the Department contended that the transfer of mineral rights to the Tribe provided by the 1968 Act is, under Section 2 of that Act, null and void and that the mineral interests at issue will become the property of Mr. Littlebird and other allottees and successors to allottees at the expiration of the time set in the 1926 Act.

On September 29, 1975, however, Mr. Littlebird executed a document entitled "Request to Discontinue Representation" (reproduced as Appendix A, *infra*), in which he stated that he had changed his position and that he now believed it would be preferable for the Tribe to retain the mineral interests in perpetuity rather than for those interests to pass to the allottees and their successors. In that document he stated that he no longer wanted the Department of Justice to represent him in the case.

In these circumstances we believe that it would be inappropriate for the United States to express any position with respect to this case. However, the Department of the Interior has requested that we bring its views to the attention of the Court. Those views are set out in Appendix B, *infra*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[3] *E.g.*, Act of March 3, 1921, 41 Stat. 1355; Act of June 4, 1920, 41 Stat. 751.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73–1545

THE NORTHERN CHEYENNE TRIBE, PLAINTIFF-APPELLEE
v.
NORTHERN CHEYENNE DEFENDANT CLASS OF ALLOTTEES, HEIRS AND DEVISEES, DEFENDANT-APPELLANT

No. 73–1546

THE NORTHERN CHEYENNE TRIBE, PLAINTIFF-APPELLEE
v.
ELVA L. LITTLECHIEF WILLIAMSON AND JAMES BOWEN, DEFENDANTS-APPELLANTS

No. 73–1547

THE NORTHERN CHEYENNE TRIBE, PLAINTIFF-APPELLEE
v.
MYRON L. LITTLEBIRD, DEFENDANT-APPELLANT

REQUEST TO DISCONTINUE REPRESENTATION

I, Myron L. Littlebird, being one of the individual allottee defendants in this action, hereby state as follows:

That in 1971 I requested the then United States Attorney, Otis L. Packwood, to represent me in this action brought by the Northern Cheyenne Tribe against many individual allottees of the Northern Cheyenne Reservation. It was my understanding that the action was brought for the purpose of determining

an Act of Congress which would reserve in perpetuity the minerals underlying the Northern Cheyenne Reservation for the benefit of the Northern Cheyenne Tribe. The prior Acts of Congress would have made the minerals underlying the land the property of the individual allottees.

At the time I requested the United States Attorney to represent me I felt that it would be best for individual owners, as myself, to retain the ownership of the minerals under our allotments. Since moving to the reservation about two years ago, I have observed the actions of the Northern Cheyenne Business Council and now believe that it would be best for all enrolled members of the Tribe to have all of the minerals underlying our reservation, owned by the Tribe for the benefit of all enrolled members.

I have not been pressured into this change of position by the Business Council or any member of the Tribe. Because of this change in my thinking I no longer desire or want the United States Attorney for the District of Montana to represent me in this case, which is now before the Supreme Court of the United States.

It is my understanding that the Northern Cheyenne Tribe's position was upheld by the District Court in Montana and this decision was reversed by the Court of Appeals of the Ninth Circuit, and it was that reversal that is presently before the Supreme Court. If the Supreme Court affirms the Circuit Court's holding it is my understanding that the minerals would be owned by the individuals. If the Supreme Court reverses the Court of Appeal's decision, then it is my

understanding that the Tribe would hold in perpetuity the minerals underlying my reservation, for the benefit of all members.

DATED this 29th day of September, 1975.

/S/MYRON L. LITTLEBIRD.

APPENDIX B

MEMORANDUM SETTING FORTH THE VIEWS OF THE DEPARTMENT OF THE INTERIOR

The Department of the Interior's position is that the Court should grant certiorari in the present case. First, the Department believes that the decision of the Court of Appeals is wrong on the law and inconsistent with past decisions of this Court. Moreover, the Department believes that the consequences of the decision would be destructive of congressional policy toward Indian tribes and of the Department's policies and programs to an extent which is potentially disastrous for the Northern Cheyenne Tribe and the preservation of the Tribe's land and culture.

On the merits, the Department believes the Court of Appeals erred in its construction of the 1926 statute. Initially, the language of that statute clearly indicates that the allottees' mineral rights would vest only in the future: such rights, the statute said, "*shall become* the property of the respective allottees or their heirs" in 1976. (Emphasis added.) This unequivocal use of the future tense is in marked contrast to several other grants of rights *in praesenti* established by the statute. Section 1 of the statute, for example, noted that the Northern Cheyenne Reservation had been established by executive order only, and it confirmed tribal ownership by stating that the Reservation "be, and the same

is hereby, declared to be the property of said Indians * * *." (Emphasis added.) Similarly, section 2 stated that "[t]he right *is hereby* reserved to any Indian to select as his allotment a tract occupied by him at the time of the approval of this Act * * *." (Emphasis added.) And with specific respect to mineral rights, the Act stated that such rights *"are hereby reserved* for the benefit of the tribe * * *." (Emphasis added.) The Court of Appeals' holding thus is at odds with a clear distinction on the face of the statute between terms reflecting the vesting of various present rights and the use of language indicating a future vesting of mineral rights in the allottees. The fact that other statutes dealing with other reservations[1] in some instances employ language even more specifically "future" or conditional is not determinative, since it is the language of the 1926 Act itself which should control its interpretation.[2]

Even if the approach of the Court of Appeals is accepted as appropriate, however, the Department

[1] *E.g.*, Act of March 3, 1921, 41 Stat. 1355 (Fort Belknap Reservation: mineral deposits in allotted lands reserved for tribe for fifty years, thereafter to become property of allottees, "but the right is reserved to Congress to extend the period within which such reserved tribal rights shall expire"); Act of June 4, 1920, 41 Stat. 751 (Crow Reservation: mineral deposits to become property of allottees after fifty years "unless otherwise ordered by Congress").

[2] Congress has plenary power over Indian affairs and property. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *Perrin* v. *United States*, 232 U.S. 478, 486 (1914). While this power of course does not give Congress authority to take vested property rights without compensation, it does serve as a backdrop against which to assess the question of whether Congress should be presumed to have limited its inherent power simply because it fails to repeat particular terminology used in other statutes.

believes that the court's conclusion is nonetheless invalid, for the 1926 Act in any event contains language similar to the terminology in the other statutes referred to above. Section 3 of the Act separated from the allotted surface ownership rights the appurtenant mineral rights, which were "reserved for the benefit of the tribe" for fifty years. Hence the mineral rights clearly were not allotted. And section 3 went on to state explicitly that "the unallotted lands of said tribe of Indians shall be held in common, *subject to the control and management thereof as Congress may deem expedient* for the benefit of said Indians." 44 Stat. at 691 (emphasis added). Moreover, section 1 of the Act, which declared the Northern Cheyenne Reservation to be the property of the Northern Cheyennes, specifically stated that such property was "subject to such control and management * * * as the Congress of the United States may direct." The "pro-Indian" canons of construction used by the court to avoid the effect of these provisions, while generally sound, are inappropriate here since Indian interests are represented on both sides of the case and since a tribal resolution immediately preceeding the 1926 Act appeared to understand and favor a splitting of the mineral and surface estates, with the Tribe to receive the mineral estate in perpetuity (Pet. p. 30).

At the heart of the approach taken by the Court of Appeals is a misapplication of past decisions of this Court dealing with Congress' power to alter statutory schemes affecting Indian property. In this respect the court's reliance on *Choate* v. *Trapp,* 224 U.S. 665 (1912), is misplaced. The law governing the validity of

congressional action in distributing or redistributing tribal property is not entirely clear. Compare *Choate* v. *Trapp, supra,* with *United States* v. *Jim,* 409 U.S. 80 (1972) (*per curiam*); *United States* v. *Rowell,* 243 U.S. 464 (1917); and *Gritts* v. *Fisher,* 224 U.S. 640 (1912). That fact itself tends to justify a grant of certiorari here, which would enable this Court to clarify the controlling legal principles. But there is no doubt that the present case is considerably closer to cases such as *Rowell, supra,* than to *Choate.*

In *Rowell,* Congress initially enacted a statute whereby the Secretary of the Interior was "authorized and directed to issue a patent in fee" to Rowell, an adopted member of the Kiowa Tribe who had received no allotment. Before the patent issued, however, Congress, having been informed that the tract in question was much more valuable than had been thought, repealed the statute. Rowell claimed that a vested property right had been taken by the repealer, but this Court disagreed. The opinion stated:

> "[I]f, before that direction [to issue a patent] was complied with, it was discovered that the land designated was lawfully devoted to a special use from which it could not be withdrawn with due regard for the tribe in general, or that its situation and value were such that to allot or convey it to [Rowell] would invest him with much more than a fair distributive share of the common property of the tribe, we think it was * * * admissible for Congress to recall that direction in the interest of the tribe as a whole." 243 U.S. at 468–69.

The Court concluded that there was no grant *in praesenti,* since the statute spoke merely of a patent

to be issued in the future. And here, of course, the situation is essentially the same: in 1926 Congress envisioned a transfer of mineral rights in the future, but later acted to cancel the expected transfer before it occurred. Especially where (as in *Rowell*) Congress is dealing essentially with an allocation of tribal property between a tribe and its members, its plenary power over Indian affairs justifies such action. See *United States* v. *Jim, supra. Choate* v. *Trapp,* by contrast, involved (1) the grant by Congress of a tax immunity that had already gone into effect by the time of the purported cancellation, and (2) a controversy between Indians on the one hand and the State of Oklahoma on the other, not merely a question concerning the allocation of tribal property between a tribe and its members.

The Department further believes certiorari is appropriate in this case in light of a serious inconsistency between the decision below and federal policy toward American Indians and toward the Northern Cheyenne Tribe in particular, as embodied in the Indian Reorganization Act of 1934, 48 Stat. 984, and in recent actions by the Secretary of the Interior. Indeed, the decision of the Court of Appeals threatens to have disastrous consequences for those policies and for the Northern Cheyenne Tribe.

The Indian Reorganization Act ("IRA") explicitly ended the "allotment" policy of earlier congressional enactments (such as the 1926 Act) and encouraged the consolidation of tribal landholdings on reservations and tribal reacquisition of land previously fraction-

ated by that allotment policy.[3] The purpose of the IRA in this respect was basically to promote the governmental authority of tribes and to end the divisive individualism and losses of Indian land that characterized the allotment era. See, *e.g.*, Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 15–18 (1934). The wisdom of the IRA's approach in this regard is, moreover, manifest in the present situation. The Northern Cheyenne Reservation contains massive deposits of valuable coal inviting commercial strip-mining. Tribal control of those deposits is required if the Tribe is to be able to ensure that such mining is conducted according to standards and pursuant to a plan which will not allow the Tribe's homeland to be despoiled or its heritage to be diluted by chaotic or excessive mining or an uncontrolled influx of outsiders.

During the past two years this problem has been under active consideration by this Department in several respects. Most significantly, in January 1974 the Tribe submitted to the Secretary of the Interior a formal petition asking that various coal leases and prospecting permits previously issued to energy companies be canceled for alleged legal defects. On June 4, 1974, after lengthy review of the problem at the highest levels of this Department, the Secretary responded to the petition with a written decision, a central purpose of which was basically to ensure that the Tribe would have control over development of the Reservation and that no further development would take place with-

[3] See, *e.g.*, 25 U.S.C. §§ 461, 463, 465.

out the Tribe's approval. The decision, however, was premised on the assumption that the Tribe owned the coal deposits on the Reservation. If that premise is rendered unsupportable by the Court of Appeals' decision, there is a good chance that the policy of the Secretary, as embodied in his decision of June 4, 1974—to aid the Northern Cheyenne Tribe in guarding against uncontrolled or destructive strip-mining of the Reservation—will be frustrated by the actions of individual owners of mineral rights.[4] As trustee for all Northern Cheyenne Indians, therefore, the Department of the Interior believes that it is essential for this Court to grant certiorari and reverse the Ninth Circuit's decision.

[4] To be sure, the Secretary has statutory power to approve or disapprove proposed leases of allotted lands still held in trust. But, in accordance with the Secretary's fiduciary duty to Indian allottees, this power is exercised principally to ensure a fair rental to the lessor, not—as in the case of tribal leases—on the basis of additional concerns such as protecting tribal culture and society. Moreover, some of the lands originally allotted under the 1926 Act have passed into non-Indian ownership and no longer are held in trust; as to such tracts the Secretary has no approval authority.

U.S. GOVERNMENT PRINTING OFFICE: 1978